

COUNSEL FOR DEFENDANTS

ROBERT BAXTER, STEVEN
STOELB, STEPHEN SPECKART,
M.D., C. PAUL LOEHNEN, M.D., LAR
AUTIO, M.D., GEORGE RISI, JR.,
M.D., and COMPASSION & CHOICES,

V.

Defendants.

) BRIEF IN SUPPORT OF MOTION
) FOR STAY PENDING APPEAL

**BRIEF IN SUPPORT OF MOTION FOR STAY
PENDING APPEAL
PAGE 1**

BACKGROUND

In its Order, this Court granted Plaintiffs' motion for summary judgment declaring the homicide statutes unconstitutional as applied:

The Montana constitutional rights of individual privacy and human dignity, taken together, encompass the right of a competent terminally [ill] patient to die with dignity. That is to say, the patient may use the assistance of his physician to obtain a prescription for a lethal dose of medication that the patient may take on his own if and when he decides to terminate his life. The patient's right to die with dignity includes protection of the patient's physician from liability under the State's homicide statutes.

12/8/08 Order at 23-24.

ARGUMENT

Rule 22, Mont. R. App. P. authorizes a district court to issue a stay of judgment or an order pending an appeal to the Montana Supreme Court. The Court must promptly enter a written order on the motion and include findings of fact and conclusions of law, or, in a supporting rationale, the relevant facts and legal authority on which the district court's order is based. Mont. R. App. P. 22(1)(d).

Rule 22 is the successor to former Rule 40, Mont. R. App. P., which in turn referenced Rule 62, Mont. R. Civ. P. Rule 62(c) provides:

Injunction pending appeal. When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the district court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

Rule 62(c), Mont. R. App. P., is virtually identical in substance to Rule 62(c), Fed. R. Civ. P.

Under Rule 62(c), the Ninth Circuit has held that the strength of the showing on the merits that is required to support an injunction or stay pending appeal depends on the extent of the imbalance in the potential hardships that might be suffered by the respective

parties. William Ingles & Sons Baking Co. v. ITT Continental Baking Co., 526 F.2d 86, 87-88 (9th Cir. 1975). See also Mont. Code Ann. § 27-19-201(2) (providing for preliminary injunction when act “would produce a great irreparable injury”). Applying these factors in Humane Society of the United States v. Gutierrez, 523 F.3d 990, 991 (9th Cir. 2008), the Court approved an emergency stay where lower court’s ruling authorized the lethal taking of California sea lions which the Court determined, by definition, was irreparable. Perforce conduct that amounts to homicide under existing Montana law is irreparable.

Entry of a stay will have no effect on the named Patient Plaintiffs in this case. Robert Baxter died the day the Court’s decision was issued. Stephen Stoelb withdrew from the case after the State’s expert physician opined that he was not terminally ill and therefore did not qualify for the relief sought.

The Court’s Order therefore operates only with respect to an unidentified, unknown category of patients who may seek to obtain a prescription for a lethal dose of medication for the purpose of ending their lives. The Court’s Order recognizes the State’s compelling interests in protecting these patients and their loved ones from abuses, but concludes that those interests may adequately be protected through legislation. (12/8/08 Order at 24.) Since no legislation currently exists, however, the State’s compelling interests are wholly unprotected absent a stay.

Unless and until detailed guidelines for physician assisted suicide are enacted, as they have been in Oregon and Washington, the State’s only means of protecting its interests and those of its citizens is through its criminal laws. By categorically immunizing Physician Plaintiffs (and potentially an unknown, unidentified group of other physicians) from criminal liability under the homicide statutes, irreparable harm to the State’s compelling interests is certain if a patient dies as a result of ingesting the prescribed medication. Moreover, physicians are without guidelines to chart this new frontier of medical practice which significantly departs from accepted standards of care.

To date, there has been no analysis of Mont. Code Ann. § 45-5-105 (the assisted suicide statute), which still applies to physicians notwithstanding the Court's Order relative to the homicide statutes.

Given the significance of this Court's decision and its potential ramifications, as well as the need for the Montana Supreme Court to ultimately declare whether such a constitutional right exists, the State's request for a stay should be granted. This will protect physicians from any uncertainty about their professional obligations, and protect Montana citizens from any mischief that may follow from an unregulated right to commit homicide as it has been defined by the legislature.

Respectfully submitted this 10th day of December, 2008.

MIKE McGRATH
Montana Attorney General
ANTHONY JOHNSTONE
Solicitor
JENNIFER ANDERS
Assistant Attorney General
Justice Building
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By: _____

ANTHONY JOHNSTONE
Solicitor

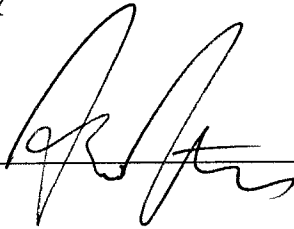
CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Brief in Support of Motion for Stay Pending Appeal. to be mailed to:

Mr. Mark S. Connell
Connell Law Firm
502 W. Spruce
P.O. Box 9108
Missoula, MT 59807-9108

Ms. Kathryn L. Tucker
c/o Compassion and Choices
P.O. Box 415
6312 SW Capitol HWY
Portland OR 97201

DATED: 10 Dec. 2009



A handwritten signature in black ink, appearing to be 'Mark S. Connell', is written over a horizontal line.